

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CIVIL No. 12-1501 DSD/JJK

RONALD BERNARD, as duly
appointed representative for
Todd Michael Bernard, deceased,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

DEFENDANT'S RESPONSE
TO PLAINTIFF'S OBJECTION'S TO
MAGISTRATE REPORT AND RECOMMENDATION

On July 1, 2013, Magistrate Judge Jeffrey J. Keyes issued a Report and Recommendation upholding the ALJ's non-disability decision, finding that substantial evidence supported the conclusion that if Plaintiff stopped abusing alcohol, he would not be disabled from working. R & R (Doc. #17, at 25-27). In his district court brief, Plaintiff never took issue with the ALJ's evaluation of his alcoholism. (Doc. #13). Therefore, Plaintiff has waived consideration of this issue and cannot now, for the first time, challenge the ALJ's evaluation of the materiality of Plaintiff's alcohol abuse in his Objections to the Magistrate Judge's Report and Recommendations. Plaintiff's Objections (Doc. #19). Hacker v. Barnhart, 459 F.3d 934, 937 n.2 (8th Cir. 2006) (quoting Jasperson v. Purolator Courier Corp., 765 F.2d 736, 740 (8th Cir. 1985) ("A party's failure to raise or discuss an issue in his (opening) brief is to be deemed an

abandonment of that issue.”); Roberts v. Apfel, 222 F.3d 466, 470 (8th Cir. 2000) (a claimant cannot raise issues for the first time in his objections to the magistrate judge’s proposed findings as doing so would effectively give a claimant two opportunities for judicial review).

In any event, as Magistrate Keyes correctly found, substantial evidence supports the ALJ’s determination that Plaintiff would not be disabled if he stopped abusing alcohol. R & R (Doc. #17, at 25-26). While Magistrate Keyes found the ALJ’s articulation of the materiality of Plaintiff’s alcohol abuse lacking, he correctly found any such articulation deficiencies to be harmless because substantial evidence supports the ALJ’s determination that Plaintiff would not be disabled if he would stop abusing alcohol. R & R (Doc. #17, at 22-26). Plaintiff’s attempts to mischaracterize the Magistrate Judge’s analysis cannot overcome the fact that substantial evidence supports the ALJ’s non-disability decision. Plaintiff’s Objections (Doc # 19 at 6). Specifically, Plaintiff challenges the Magistrate Judge’s finding that “if one assumes Plaintiff were to stop drinking, as the regulations require,” . . . “Plaintiff could perform the limited work described by the state agency consultants” Id. citing R & R (Doc. #17, at 23). However, contrary to Plaintiff’s contentions of any error, Magistrate Judge Keyes was citing to Agency regulations *verbatim* when he noted that ALJs must consider whether a claimant would still be disabled “if [a claimant] stopped using drugs or alcohol.” 20 C.F.R. § 404.1535 (b). R & R (Doc. #17, at 23). Thus, Plaintiff’s contentions that Magistrate

Judge Keyes applied “erroneous legal standards” to reach his determination have no merit and should be rejected. Plaintiff’s Objections (Doc. #19 at 13).

CONCLUSION

Since substantial evidence supports the ALJ’s findings and ultimate non-disability decision, the Commissioner respectfully requests that this Court adopt Magistrate Judge Keyes’ Report and Recommendation and affirm the Commissioner’s decision.

Dated: 7-29-13

Respectfully submitted,

B. TODD JONES
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s/ Ana H. Voss

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